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In The

Supreme Court of the United States

October Term, 1994

AUTO-OWNERS INSURANCE COMPANY,
Petitioner,

-vs-

THORN APPLE VALLEY, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

AND APPENDIX

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I.

WHETHER FEDERAL COMMON LAW UNDER ERISA ALLOWS A FEDERAL DISTRICT COURT TO INFER A FEDERAL CAUSE OF ACTION AND A FEDERAL REMEDY TO RESOLVE A PRIORITY OF COVERAGE DISPUTE BETWEEN NO-FAULT AUTOMOBILE INSURANCE COVERAGE, WHICH IS GOVERNED ENTIRELY BY STATE LAW, AND COVERAGE UNDER A SELF-FUNDED WELFARE BENEFIT PLAN, WHICH IS GOVERNED BY ERISA, DESPITE THE FAILURE OF CONGRESS TO PROVIDE FOR SUCH CAUSE OF ACTION AND REMEDY EXPRESSLY IN SECTION 502 OF ERISA.

II.

WHETHER, ASSUMING A CAUSE OF ACTION AND REMEDIAL AUTHORITY ARE AUTHORIZED BY CONGRESS TO RESOLVE A PRIORITY OF COVERAGE DISPUTE BETWEEN A NO-FAULT INSURER AND SELF-FUNDED ERISA PLAN, FEDERAL COMMON LAW UNDER ERISA REQUIRES THE PRORATION OF LIABILITY BETWEEN THE TWO ENTITIES.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below are listed in the caption. Respondent, Thorn Apple Valley, Inc., has no parent companies, affiliated companies or nonwholly owned subsidiaries.

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BRIEF IN OPPOSITION

Respondent, Thorn Apple Valley, Inc., respectfully requests the Court to deny the petition for certiorari, which seeks review of the decision of the U.S. Court of Appeals for the Sixth Circuit reported at 31 F.3d 371 (6th Cir. 1994).

STATUTORY PROVISIONS

The decision by the Sixth Circuit below was based on that court's construction of Section 514 the Employee Retirement Income Security Act of 1974 (ERISA), as amended.

Additionally, resolution of the issues raised in the petition, assuming the Court chooses to consider them, requires consideration and interpretation of § 3109a of Michigan's no-fault insurance law, MICH. COMP. LAWS § 500.3109a (1993), and § 502 of ERISA, 29 U.S.C. § 1132.

The foregoing statutory provisions are repeated in their entirety herein in Appendix A-1–A-16.

STATEMENT OF THE CASE[1]

This case arises from a dispute over whether no-fault automobile insurance coverage, which is governed by Michigan law, or coverage under a self-funded ERISA plan, which is governed entirely by federal law, is required to pay the medical expenses incurred by Chris Shattuck on account of his 1989 automobile accident.

Petitioner, Auto Owners Insurance Co. (Auto Owners), is a Michigan no-fault automobile insurance company. It sold no-fault auto insurance coverage to Joseph Shattuck under which his son, Chris Shattuck, was insured in 1989.

Joseph Shattuck was also an hourly employee of Respondent, Thorn Apple Valley, Inc. (TAV). As a fringe benefit, TAV provided medical benefits to Mr. Shattuck for himself and for his eligible dependents pursuant to a self-funded ERISA welfare benefit plan, which was also in effect in 1989.

It is uncontroverted that Chris Shattuck's 1989 auto accident was covered under his father's no-fault insurance policy with Auto Owners. Auto Owners paid the resulting medical expenses in their entirety.

In 1992, Auto Owners sued TAV in a Michigan state court, contending that since Chris Shattuck was also a beneficiary under TAV's ERISA plan it could "recoup" from TAV all medical payments made on Chris Shattuck's behalf. Auto Owners asserted in its complaint that its no-fault insurance policy provided benefits "only to the extent that same are in excess of coverage for expenses provided under any individual or group health care cov-

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[1] **We are generally satisfied with the summary of facts set forth in the opinion of the Sixth Circuit below. This additional summary is provided only to clarify the posture of this litigation.**

erage plan" and that a right of "recoupment" from TAV existed pursuant to MICH. COMP. LAWS § 500.3109a (1993).[2] TAV's ERISA plan, however, also expressly provided that its coverage "does not apply to any liability for any losses covered by" any kind of insurance, including "any type of coordinating policy with an automobile insurance carrier." For this reason, TAV denied coverage for Chris Shattuck's medical expenses, and refused to pay anything to Auto Owners.

TAV removed this action from state court to the U.S. District Court for the Western District of Michigan seven days after the complaint was filed. Shortly thereafter, TAV moved for summary judgment on the ground that Auto Owners' state law "recoupment" claim was preempted by ERISA. Auto Owners responded by asserting that although state law was preempted it could still "recoup" its no fault payments from TAV under "federal common law," and submitted a cross-motion for summary judgment.

On April 12, 1993, the district court denied TAV's motion, granted Auto Owners' motion and ordered that liability for Chris Shattuck's 1989 medical expenses be "apportioned between the insurers [*sic*] on a pro rata basis," which the court went on to define as "50% each." 818 F. Supp. 1078 (W.D. Mich. 1993). The district court agreed with TAV that state law was preempted and that "the ERISA statute does not provide an answer" to the coverage dispute, but then attempted to formulate a "federal common law rule" based on the "minority state law approach" to apportioning liability between insurance companies.

The Sixth Circuit reversed the district court on August 1, 1994. 31 F.3d 371 (6th Cir. 1994). It reasoned

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[2] This statute in fact merely required Auto Owners to *offer* no-fault insurance coverage which purported to be secondary to other medical coverage on its insureds.

that the underlying purpose of ERISA — the protection of "the interests of participants in employee benefit plans and their beneficiaries" — would be best served by enforcing the ERISA plan's coordination of benefits provision as written. The court rejected the district court's apportionment of liability between Auto Owners and TAV, citing an analogous decision by the Michigan Supreme Court in *Auto Club Insurance Ass'n.* v. *Frederick & Herrud, Inc.*, 443 Mich. 358, 505 N.W.2d 820 (1993), *cert. denied sub nom., Auto Club Insurance Ass'n.* v. *Pentwater Wire Products, Inc.*, 511 U.S. ___, 114 S. Ct. 1300 (1994). The court concluded that the "preemptive effect of ERISA" warrants giving "full effect" to the TAV plan's coordination of benefits provision despite the presence of a similar provision in Auto Owners' no-fault auto insurance policy. 31 F.3d at 375.

Auto Owners filed a petition for rehearing, *en banc*. The Sixth Circuit denied this petition on September 26, 1994.

Auto Owners now urges this Court to consider and adopt a pro rata apportionment "federal common law" remedy for coverage disputes between Michigan no-fault auto carriers and ERISA plans.

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REASONS WHY THE PETITION SHOULD BE DENIED

Once this Term and once last Term the Court has declined to consider the same narrow and parochial question formulated by Petitioner here. *Auto Club Insurance Ass'n.* v. *Pentwater Wire Products, Inc.*, 511 U.S. ___, 114 S. Ct. 1300 (1994); *Auto Club Ins. Ass'n.* v. *White & White, Inc.*, 513 U.S. ___, 130 L. Ed. 2d 283 (1994). Auto Owners parrots the contentions made in support of these previous petitions, and urges nothing warranting a different result here.

I.

SINCE AUTO OWNERS HAS NO ERISA CAUSE OF ACTION AGAINST TAV TO BEGIN WITH, THERE IS NO NEED TO CONSIDER THE PARAMETERS OF FEDERAL COMMON LAW UNDER ERISA.

The parties in this litigation have not chosen quite as "narrow [a] battlefield" as Petitioner suggests, and certainly has not left only the abstractions formulated in the petition for possible consideration by this Court. *See generally Mertens* v. *Hewitt Associates*, 508 U.S. ___, 113 S. Ct. 2063, 2067 (1993). In fact, it is doubtful that a cause of action under ERISA even exists between Auto Owners and TAV under federal law, much less one which would necessitate an examination of the "federal common law" issue Petitioner has urged here and below. In order to reach the "federal common law" issue Auto Owners posits, a court must necessarily consider whether ERISA permitted Auto Owners to sue TAV for "recoupment" in the first place. Since maintenance of such a cause of action by Auto Owners cannot be squared with the language of ERISA or with previous decisions of this Court, review of the question of just

how "federal common law" might resolve such a non-existent claim is at best hypothetical.[3]

In *Mertens*, the Court reaffirmed that claims and remedies under ERISA are limited to those specifically set forth in the statute's "comprehensive and reticulated" civil enforcement provision. *See Mertens* v. *Hewitt Associates*, 508 U.S. ___, 113 S. Ct. 2063 (1993). In view of this "carefully crafted and detailed enforcement scheme," the Court stated its "unwillingness to infer causes of action in the ERISA context." 113 S. Ct. at 2067; *see also Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134, 146-47 (1985); *Pilot Life Insurance Co.* v *Dedeaux*, 481 U.S. 41, 54 (1987).[4] We are unaware of any change in the Court's approach since *Mertens*. *See Buckley Dement, Inc.* v. *Travelers Plan Administrators of Ill., Inc.*, 39 F.3d 784, 788-790 (7th Cir. 1994).

"Federal common law" offers no detour around ERISA's comprehensive civil enforcement scheme or the foregoing principles. True enough, the legislative history underlying ERISA indicates that Congress intended that a "body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans." 120 Cong. Rec. 29942 (1974) (remarks of Senator

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[3] The district court below candidly acknowledged that "the ERISA statute itself does not provide an answer" for this dispute. 818 F. Supp. at 1081. Although this did not deprive the district court of federal jurisdiction, it should arguably have compelled the prompt dismissal of Auto Owners' lawsuit then and there. *See generally Metropolitan Life Insurance Co.* v. *Taylor*, 481 U.S. 58 (1987); *Amos* v. *Blue Cross & Blue Shield of Alabama*, 868 F.2d 430, 431 (11th Cir. 1989), *cert. denied*, 493 U.S. 855 (1989) (ERISA preemption is "not a gateway but a barrier to state law causes of action").

[4] The unwillingness of this Court to legislate new causes of action under statutes containing comprehensive enforcement and remedial provisions is not limited to ERISA litigation. *See also Northwest Airlines, Inc.* v. *Transport Workers Union of America*, 451 U.S. 77, 97 (1981) ("the judiciary may not in the face of such comprehensive legislative schemes, fashion new remedies that might upset carefully considered legislative programs").

Javits), *quoted in Pilot Life Insurance Co.* v. *Dedeaux*, 481 U.S. at 56; *see also Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110 (1989). But, "the authority of courts to develop a 'federal common law' under ERISA . . . is not the authority to revise the text of the statute." *Mertens* v. *Hewitt Associates*, 508 U.S. at ___, 113 S. Ct. at 2070. *See also Buckley Dement, Inc.* v. *Travelers Plan Administrators of Ill., Inc.*, 39 F.3d at 789-790.

Auto Owners nonetheless urges a result which is directly at odds with this principle, and which invites this Court to engage in virtually unlimited judicial legislation. For only by first ignoring the text of ERISA and inventing judicially a cause of action that Congress did not authorize in the statute, would a court then have occasion to address the abstract question of what "federal common law" rule applies. In this regard, "recoupment," the ostensible basis for Auto Owners' claim against TAV, was not even a recognized claim at common law, *see, e.g., Frederick* v. *United States*, 386 F.2d 481, 487 (5th Cir. 1967) (recoupment is "for defensive use only, and a defendant [can] not use it as [a] basis for . . . judgment in his favor"), let alone is it among the six causes of action that were expressly enacted by Congress in Section 502 of ERISA. Nor is Auto Owners among those entities that are authorized by Congress to bring actions under Section 502.

Congress surely could have recognized a "recoupment" claim, or otherwise provided for "litigation when a plan subject to ERISA interlocks with coverage governed by state law," but it did not do so. *See Foster McGaw Hospital of Loyola University of Chicago* v. *Building Material Chauffeurs, Teamsters and Helpers Welfare Fund of Chicago, Local 786*, 925 F.2d 1023, 1025 (7th Cir. 1991), *cert. denied*, 502 U.S. ___, 112 S. Ct. 74 (1991). No conceivable justification exists for judicially revising Congress' statutory scheme and creating a cause of action for insurance companies that wish to sue ERISA plans under theories that were unknown even at common law!

Without a cause of action between Auto Owners and TAV in the first instance, the Court has no need to consider the question of how "federal common law" might resolve it.

II.

THERE IS NO CONFLICT WITHIN THE SIXTH CIRCUIT, AMONG THE CIRCUITS OR WITH OTHER JURISDICTIONS CONCERNING THE APPLICATION OF FEDERAL COMMON LAW TO COVERAGE DISPUTES BETWEEN ERISA PLANS AND INSURANCE COMPANIES.

There is no ongoing conflict within the Sixth Circuit, among the federal circuits, or between the Sixth Circuit and state jurisdictions warranting this Court's consideration of the issue posited in Auto Owners' petition. In fact, a review of the pertinent cases confirms that no-fault automobile insurance/ERISA plan coverage conflicts are peculiar to the state of Michigan, and that the law prevailing in the Sixth Circuit and in Michigan's state courts is consistent and uniform.

Sixth Circuit

Prior to its decision in this case; the Sixth Circuit had on a number of previous occasions addressed various issues arising in the context of Michigan no-fault auto insurance/ERISA plan coverage disputes, with a progression of outcomes and rationales. *See, e.g., Northern Group Services, Inc.* v. *Auto Owners Insurance Co.*, 833 F.2d 85 (6th Cir. 1987), *cert. denied, Northern Group Services, Inc.* v. *State Farm Mutual Automobile Insurance Co.*, 486 U.S. 1017 (1988); *Liberty Mutual Insurance Group* v. *Iron Workers Health Fund of Eastern Michigan*, 879 F.2d 1384 (6th Cir. 1989); *Auto Club Insurance Ass'n.* v. *Health & Welfare Plans, Inc.*, 964 F.2d 588 (6th Cir. 1992); *Lincoln Mutual Casualty Co.* v. *Lectron Products, Inc. Employee*

Health Benefit Plan, 970 F.2d 206 (6th Cir. 1992). The Sixth Circuit's decision below in this case was the next logical step in this progression. In the context in which it was decided, it is entirely consistent with previous decisions.

In *Northern Group Services*, the Sixth Circuit in 1987 concluded that ERISA did not preempt the application of Michigan's no-fault auto insurance law in coverage disputes between Michigan no fault auto insurers and self-funded ERISA plans. The court, in this decision, permitted no-fault insurers to pursue claims against ERISA plans directly under state law, in order to force them to pay auto accident claims on a primary basis even if that result was inconsistent with or impaired the ERISA plans' provisions. This holding, however, was effectively overturned by this Court's 1990 decision in *FMC Corp.* v. *Holliday*, 498 U.S. 52 (1990), that the application of state law to self-funded ERISA plans is preempted. The death of *Northern Group Services* was confirmed one week after *FMC* was decided, when this Court entered its order in *Thorn Apple Valley, Inc.* v. *Auto Club Insurance Ass'n*, 498 U.S. 996 (1990), *vacating sub nom., Auto Club Insurance Ass'n* v. *Frederick & Herrud, Inc.*, 175 Mich. App. 412, 438 N.W.2d 320 (1989).

Two years later in 1992, the Sixth Circuit acknowledged the demise of *Northern Group Services*, and the clear preemption of state law in no-fault automobile insurance/ERISA plan controversies in *Health & Welfare Plans* and *Lectron Products*. It remanded both cases to the district court level to determine how "federal common law" would apply to the disputes. Although in both cases the Sixth Circuit suggested the possibility of apportioning liability, this was clearly not mandated.

The district court in the case at bar, in the meantime, became the first (and so far as we are aware only) fed-

eral court (post-*FMC*) actually to apply a pro rata apportionment remedy in a no-fault automobile insurance/ERISA plan dispute as a matter of "federal common law." In reversing the district court, the Sixth Circuit considered *Health & Welfare Plans* and *Lectron Products*, along with an intervening decision by the Michigan Supreme Court in *Auto Club Insurance Ass'n* v. *Frederick & Herrud, Inc.*, 443 Mich. 358, 505 N.W.2d 820 (1993), *cert. denied sub nom.*, *Auto Club Insurance Ass'n* v. *Pentwater Wire Products, Inc.*, 511 U.S. ___, 114 S. Ct. 1300 (1994),[5] and concluded that an apportionment of liability between a no-fault insurer and an ERISA plan would be inappropriate under "federal common law." Instead, the Court held that in view of the broad pre-emptive effect of ERISA, the terms of the ERISA plan should be enforced as written, and that the no-fault auto insurer must therefore be primarily responsible for paying the auto accident related medical expenses of its own insureds.

In the context of this developing case law, the Sixth Circuit's decision below has created no conflict or lack of uniformity within the Sixth Circuit. In refusing to grant *en banc* rehearing, the Sixth Circuit acknowledged as much.

Seventh Circuit

As have Michigan auto insurers in each of their two previous attempts to convince this Court to review the application of "federal common law" to Michigan no-fault auto insurance/ERISA plan coverage disputes, Auto Owners again urges that the Sixth Circuit's decision here conflicts with the Seventh Circuit's 1988 decision in *Winstead* v. *Indiana Insurance Co.*, 855 F.2d 430 (7th Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989). A review of developing ERISA

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[5] This was the same case that was vacated and remanded by this Court in 1990. *See* 498 U.S. 996 (1990).

case law in the Seventh Circuit, however, confirms that *Winstead* does not reflect (and for a number of years has not reflected) current law even in the Seventh Circuit.

Winstead involved a coverage dispute between a Michigan no-fault insurer and an Illinois based ERISA plan that happened to be litigated in the Seventh Circuit rather than the Sixth Circuit. Without having the benefit of this Court's decisions in *FMC Corp.* v. *Holliday*, 498 U.S. 52 (1990); *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989) and *Mertens* v. *Hewitt Associates*, 508 U.S. ___, 113 S. Ct. 2063 (1993), and without even directly addressing whether *Michigan law* is preempted by ERISA,[6] the Seventh Circuit panel in *Winstead* approved a "pro rata" division of liability, which it said was "not only in keeping with generally accepted notions derived from state common law . . . but [which] seems eminently fair and equitable." 855 F.2d at 434. The court did not say how this "solomonic" remedy was divined from either ERISA's text or its underlying policies, nor did it provide any other rationale for adopting it.

The holding in *Winstead* has not been followed by the Seventh Circuit in subsequent cases. There appear to be a number of reasons for this:

1. As previously indicated, *Winstead* preceded this Court's decisions in *FMC*, *Bruch* and *Mertens*, each of which significantly altered and clarified the legal landscape for adjudicating claims against ERISA plans. More recently, the Seventh Circuit has squarely refused to use "federal common law" to augment the specific remedial provisions of Section 502 of ERISA. *Buckley Dement, Inc.* v. *Travelers Plan Administrators of Ill., Inc.*, 39 F.3d at 790.

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6 *Northern Group Services* was then the prevailing law in the Sixth Circuit on the issue of preemption, but the Court in *Winstead* declined to adopt it, suggesting that "it is by no means clear that we would follow *Northern Group Services* should the question be presented." 855 F.2d at 435.

2. Subsequent to *Winstead*, the Seventh Circuit effectively repudiated the essential premise on which that case was decided, by recognizing that Congress had provided no basis under ERISA for "consolidated litigation when a plan subject to ERISA interlocks with coverage governed by state law." *Foster McGaw Hospital of Loyola University of Chicago* v. *Building Material Chauffeurs, Teamsters and Helpers Welfare Fund of Chicago, Local 786*, 925 F.2d 1023, 1025 (7th Cir. 1991), *cert. denied*, 502 U.S. ___, 112 S. Ct. 74 (1991). Having recognized that there is no basis for "consolidated litigation" to resolve coverage disputes between ERISA plans and state regulated coverages in the first place, it is hardly surprising that the Seventh Circuit has not revisited *Winstead's* "solomonic" apportionment of liability.

3. Additionally, the Seventh Circuit has held in recent decisions that in developing "federal common law" in ERISA cases, the courts must "effectuat[e] the policies underlying ERISA." *E.g.*, *Thomason* v. *Aetna Life Insurance Co.*, 9 F.3d 645, 647 (7th Cir. 1993). In this regard, it has also ruled that it is of no consequence that the enforcement of ERISA plans as written will "abrogate principles of state law." *Land* v. *Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Health and Welfare Fund*, 25 F.3d 509, 513 (7th Cir. 1994). Whatever its merits, *Winstead's* apportionment rule is a state law rule that cannot be square with any policies or principles emanating from ERISA.

In view of these developments, it is hardly surprising that *Winstead* has not been followed by the Seventh Circuit since its issuance.

Other Circuits

Auto Owners does not directly contend that the Sixth Circuit's decision below conflicts with the law in other circuits. In fact, it does not.

A dispute over coverage between two ERISA plans can, at least arguably, be litigated directly under Section 502(a)(3) of ERISA, as a claim by one plan "to enforce" its provisions against the other plan. *See Winstead* v. *J.C. Penney Co.*, 933 F.2d 576, 578-79 (7th Cir. 1991). Several circuits have attempted to formulate "federal common law" to resolve such ERISA plan disputes. But resolving coverage disputes between ERISA plans under ERISA is hardly comparable to inventing a cause of action for resolving a coverage dispute between an ERISA plan and an entity which is not covered by ERISA at all.

In 1985, the Third Circuit in *Northeast Department ILGWU Health & Welfare Fund* v. *Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 147 (3d Cir. 1985), held in the context of a dispute between two ERISA plans that inclusion in a multi-employer ERISA plan by the plan's trustees of an "escape clause," whereby coverage under that plan would not apply if the beneficiary was covered elsewhere might constitute a breach of fiduciary duty under ERISA. More recently, the Third Circuit severely limited its holding in *Northeast* to the adoption of an "escape clause" by the trustees of a multi-employer benefit plan. *Nazay* v. *Miller*, 949 F.2d 1323, (3d Cir. 1991). The Third Circuit having limited its holding in *Northeast* to the narrow facts of that case, facts which are not remotely applicable here, there is no basis for suggesting that the Third Circuit would today hold TAV's coordination of benefits provision "unenforceable" or a breach of fiduciary duty.

The Ninth Circuit, in *PM Group Life Insurance Co.* v. *Western Growers Assurance Trust*, 953 F.2d 543 (9th Cir.

1992), borrowed the so-called "birthday rule" from state insurance law to resolve a coverage dispute between two ERISA plans. This Court recently declined to consider *that* issue. *See Inter Valley Health Plan* v. *Blue Cross/Blue Shield of Connecticut*, 16 Cal. App. 4th 60, 19 Cal. Rptr. 2d 782 (1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 881 (1994). Having determined that there is no need to consider the application of federal common law to coverage disputes between ERISA plans, concerning which an ERISA cause of action at least arguably exists under Section 502, it is problematic how the Court could find persuasive Petitioner's request that it decide the application of "federal common law" to a dispute between an ERISA plan and an insurance company, regarding which no cause of action under Section 502 exists at all.

State Court Decisions

Auto Owners ignores in its petition a decision by Michigan's highest court which is in full accord with the Sixth Circuit's decision below. In *Auto Club Insurance Ass'n.* v. *Frederick & Herrud, Inc.*, 443 Mich. 358, 505 N.W.2d 820 (1993), the Michigan Supreme Court unanimously held that in a coverage dispute between a no-fault insurance carrier and an ERISA plan the coordination of benefits provision in the ERISA plan "must be given its clear meaning without the creation of any artificial conflict [with the auto carrier's policy] based upon [MICH. COMP. LAWS § 500.3109a]." *Id.* At 387, 505 N.W.2d at 833. Thus, the "federal common law" rule applied in such disputes by the Michigan courts is identical to the rule of law announced by the Sixth Circuit below. Significantly, the Court declined to review *Frederick & Herrud* approximately one year ago. *Auto Club Insurance Ass'n.* v. *Pentwater Wire Products, Inc.*, 511 U.S. ___, 114 S. Ct. 1300 (1994). The Sixth Circuit's endorse-

ment of the position taken by Michigan's highest court surely does not present a more compelling case for review.

Other state decisions which Petitioner claims are in conflict with the Sixth Circuit's decision below do not in fact even address the application of "federal common law" to coverage disputes between ERISA plans and coverages governed by state law, much less provide conflicting rules of law. *Inter Valley Health Plan*, 16 Cal. App. 4th at 60, 19 Cal. Reptr. 2d at 782 (1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 881 (1994), involved a coverage dispute between two ERISA plans, again a very different situation from the one at bar, concerning which a cause of action under Section 502 of ERISA does not even arguably exist. In *Blue Cross and Blue Shield of Kansas, Inc.* v. *Riverside Hospital*, 237 Kan. 829, 703 P.2d 1384 (1985), an insurance company providing health benefits to employees of a governmental employer (which was exempt from coverage under ERISA) was permitted to sue an ERISA plan under state law theories of "contribution and indemnity." The Kansas court's rejection of ERISA preemption in this 1985 decision, however, cannot be reconciled with this Court's 1990 decision in *FMC* holding that the application of state law to ERISA plans is preempted.

So far as we are aware, no state or federal court has adopted a "federal common law" rule that conflicts with the Sixth Circuit's decision below.

III.

THE DECISION BELOW ADVANCES RATHER THAN IMPAIRS THE POLICIES UNDERLYING ERISA.

Turning ERISA and its underlying policies completely upside down, Auto Owners contends that Congress'

mandate in Section 514 of ERISA that ERISA plans be immune from obligations imposed by state law should be ignored, and a remedy in favor of no-fault insurance companies against ERISA plans should be judicially created under the guise of developing "federal common law." Aside from incessantly chanting that it is somehow unfair or unjust to force auto insurers in Michigan to pay the medical claims of their own insureds, which is anything but self-evident, Auto Owners articulates no policy emanating from ERISA that would be furthered by adopting a "federal common law" rule which forces ERISA plans to reimburse no-fault auto insurers for medical claims incurred by plan beneficiaries in contravention of plan language expressly providing otherwise.

There is nothing "blurry" or otherwise faulty in the Sixth Circuit's conclusion that the preemptive effect of ERISA has created an unlevel "playing field" which immunizes ERISA plans from claims that the plans have "expressly disavowed." Congress broadly preempted state laws that relate to ERISA plans. *See* 29 U.S.C. § 1144(a) (1985). Auto Owners' no-fault auto insurance policy contains a coordination of benefits clause *because* of the preempted state law that mandated it. *See* MICH. COMP. LAWS § 500.3109a. If the clause is not therefore *void*, since the law that mandated it is void, the clause is certainly *unenforceable* against ERISA plans in the context of lawsuits which seek to force the plans to provide coverage that the plans' fiduciaries have denied.

The interests of participants and beneficiaries of ERISA plans, which ERISA is clearly intended to protect, *see* 29 U.S.C. § 1001(b), would not be advanced by a "federal common law" rule allowing auto insurance carriers to force ERISA plans to pay claims they have expressly disclaimed. Indeed, plan participants and beneficiaries,

such as Chris Shattuck, would not benefit one bit from such a result. After all, Mr. Shattuck's medical expenses were paid by Auto Owners in full, and Auto Owners only brought this litigation in an attempt to force TAV to indemnify *it*, not Mr. Shattuck. *See generally Physicians HealthChoice* v. *Automotive Employee Benefit Trust*, 988 F.2d 53 (8th Cir. 1993). Auto Owners' sheer speculation that under the Sixth Circuit's decision below ERISA plan beneficiaries will somehow be deprived of the right to purchase "less expensive" no-fault automobile insurance in Michigan, an outcome which is also far from obvious, cannot be said fairly to invoke any policy considerations emanating from ERISA, much less serve as a justification for creating "federal common law" out of whole cloth.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated: January 19, 1995

APPENDIX TO BRIEF IN OPPOSITION

-STATUTES INVOLVED-

• • •

SECTION 502 OF THE EMPLOYMENT RETIREMENT INCOME SECURITY ACT OF 1974, AS AMENDED, 29 U.S.C. § 1132

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought —

(1) by a participant or beneficiary —

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (l) of this section.

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of Title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if —

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 1145 of this title.

(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form

(1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title or section 1021(e)(1) of this title with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $ 100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(2) The Secretary may assess a civil penalty against any plan administrator of up to $ 1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 1021(b)(4) of this title. For purposes of this paragraph, an annual report that has been rejected under section 1024(a)(4) of this title for failure to provide material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the notice requirement of section 1021(d) of this title with respect to any participant or beneficiary or who fails to meet the requirements of section 1021(e)(2) of this title with respect to any person may in the court's discretion be liable to such participant or beneficiary or to such person in the amount of up to $100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpoena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs, awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in

favor of the plan is awarded, the court shall award the plan —

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of —

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

(h) Service upon Secretary of Labor and Secretary of Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may

not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of Title 26) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of Title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 2975(e)(1) of Title 26.

(j) Direction and control of litigation by Attorney General

In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of Title 28), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor

Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final

order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this chapter, or to compel him to take action required under this subchapter, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(l) Civil penalties on violations by fiduciaries

(1) In the case of —

(A) any breach of fiduciary responsibility under (or other violation of) part 4 by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person, the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1) —

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (1)(2) or (a)(5) of this section.

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that —

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of Title 26.

SECTION 514 OF THE EMPLOYMENT RETIREMENT INCOME SECURITY ACT OF 1974, AS AMENDED, 29 U.S.C. § 1144

§ 1144. Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(b) Construction and application

(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2) (A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance

contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 1136 of this title.

(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

(5) (A) Except as provided in subparagraph (B), subsection (a) of this section shall not apply to the Hawaii Prepaid Health Care Act (Haw. Rev. Stat. §§ 393-1 through 393-51).

(B) Nothing in subparagraph (A) shall be construed to exempt from subsection (a) of this section —

(i) any State tax law relating to employee benefit plans, or

(ii) any amendment of the Hawaii Prepaid Health Care Act enacted after September 2, 1974, to the extent it provides for more than the effective administration of such Act as in effect on such date.

(C) Notwithstanding subparagraph (A), parts 1 and 4 of this subtitle, and the preceding sections of this part to the extent they govern matters which are governed by the provisions of such parts 1 and 4, shall supersede the Hawaii Prepaid Health Care Act (as in effect on or after January 14, 1983), but the Secretary may enter into cooperative arrangements under this paragraph and section 1136 of this title with officials of the State of Hawaii to assist them in

effectuating the policies of provisions of such Act which are superseded by such parts 1 and 4 and the preceding sections of this part.

(6) (A) Notwithstanding any other provision of this section —

(i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides —

(I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and

(II) provisions to enforce such standards, and

(ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this subchapter, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this subchapter.

(B) The Secretary may, under regulations which may be prescribed by the Secretary, exempt

from subparagraph (A)(ii), individually or by class, multiple employer welfare arrangements which are not fully insured. Any such exemption may be granted with respect to any arrangement or class of arrangements only if such arrangement or each arrangement which is a member of such class meets the requirements of section 1002(1) and section 1003 of this title necessary to be considered an employee welfare benefit plan to which this subchapter applies.

(C) Nothing in subparagraph (A) shall affect the manner or extent to which the provisions of this subchapter apply to an employee welfare benefit plan which is not a multiple employer welfare arrangement and which is a plan, fund, or program participating in, subscribing to, or otherwise using a multiple employer welfare arrangement to fund or administer benefits to such plan's participants and beneficiaries.

(D) For purposes of this paragraph, a multiple employer welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary determines are guaranteed under a contract, or policy of insurance, issued by an insurance company, insurance service, or insurance organization, qualified to conduct business in a State, qualified medical child support orders (within the meaning of section 1169 (a)(2)(A) of this title), and the provisions of law referred to in section 1169(a)(2)(B)(ii) of this title to the extent enforced by qualified medical child support orders.

(7) Subsection (a) shall not apply to qualified domestic relations orders (within the meaning of section 1056(d)(3)(B)(i) of this title).

(8) Subsection (a) of this section shall not be construed to preclude any State cause of action—

(A) with respect to which the State exercises its acquired rights under section 1169(b)(3) of this title with respect to a group health plan (as defined in section 1167(1) of this title), or

(B) for recoupment of payment with respect to items or services pursuant to a State plan for medical assistance approved under title XIX of the Social Security Act [42 U.S.C.A. § 1396 et seq.] which would not have been payable if such acquired rights had been executed before payment with respect to such items or services by the group health plan.

(c) Definitions

For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of United States prohibited

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

SECTION 3190a OF MICHIGAN'S NO-FAULT AUTO INSURANCE LAW; MICH. COMP. LAWS §500.3109a

Sec. 3109a. An insurer providing personal protection insurance benefits shall offer, at appropriately reduced premium rates, deductibles and exclusions reasonably related to other health and accident coverage on the insured. The deductibles and exclusions required to be offered by this section shall be subject to prior approval by the commissioner and shall apply only to benefits payable to the person named in the policy, the spouse of the insured and any relative of either domiciled in the same household.